No. 16105

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible] C. Hoy, as District Director of the Immigration and Naturalization Service, Los Angeles, California,

Appellant,

vs.

[illegible] Rojas-Gutierrez,

Appellee.

APPELLANT'S OPENING BRIEF

Laughlin E. Waters,
United States Attorney,

Richard A. Lavine,
Assistant U. S. Attorney,
Chief of Civil Division,

Henry F. Johnson,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Miscellaneous

Statutes

No. 16105

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD C. HOY, as District Director of the Immigration and Naturalization Service, Los Angeles, California,

Appellant,

vs.

ARNULFO ROJAS-GUTIERREZ,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Appellee, plaintiff below, brought an action in the District Court seeking judicial review of an order of deportation [R. 3-8].[1] Jurisdiction there was invoked pursuant to 28 U. S. C. 2201 (the Declaratory Judgment Act) and 5 U. S. C. 1009 (Section 10 of the Administrative Procedures Act).

Since the judgment of the District Court [R. 26-27] was a final decision, this Honorable Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C. Secs. 1291 and 1294(1).

---

[1]"R." refers to the printed Transcript of Record.

Statement of the Case.

On December 2, 1957, appellee filed a "Petition for Judicial Review and Declaratory Judgment: Injunction" [R. 3-8], seeking judicial review of an order of deportation. Plaintiff, an alien, alleged that on September 28, 1956, he was served with an order to show cause by the Immigration and Naturalization Service, requiring him to show cause as to why he should not be deported from the United States on the charge that he had been convicted of a violation of law relating to the illicit possession of narcotic drugs as provided in 8 U. S. C. 1251(a)(11) [R. 5]; that on October 19, 1956, after a hearing, he was ordered deported pursuant to the order to show cause [R. 5]; that by virtue of his unsuccessful appeal to the Board of Immigration Appeals [R. 5] he had exhausted his administrative remedies [R. 7], and finally, that the order of deportation erroneously applied Section 1251(a)(11), *supra,* in that it provided for the deportation of an alien convicted of possessing "narcotic drugs," when in fact the plaintiff had been convicted of possessing "marihuana" [R. 7]. Appellee's petition concluded that the order of deportation was illegal and prayed for judgment sustaining this contention, as well as for an injunction prohibiting appellant Hoy from deporting him pursuant to the order.

Appellant, on December 2, 1957, answered [R. 8-12] appellee's petition with a general denial.

The pre-trial order [R. 12-16] filed March 3, 1958, recited as facts, among others, that plaintiff had twice been convicted in the State of California courts for possessing marihuana in violation of Sections 11160 and 11500 of the Health and Safety Code of California [R. 14]; and

that on July 18, 1956, 8 U. S. C. 1251(a)(11) was amended to provide for the deportation of an alien who at any time had been convicted of violating any law or regulation relating "to the illicit possession of or traffic in narcotic drugs" [R. 14]. The pre-trial order reveals that there were no issues of fact [R. 15], but that among the issues of law[2] involved was whether 8 U. S. C. 1251(a)-(11), as amended, included marihuana within "narcotic drugs" in the phrase "illicit possession of or traffic in narcotic drugs. . . ."

The Honorable William C. Mathes, in a written opinion filed April 25, 1958 [R. 16-23], sustained contentions of appellee on the grounds that his brother judge, the Honorable Harry C. Westover, had previously decided the question [R. 20] adversely to appellant.[3] Thereafter, judgment [R. 26-27] was entered granting appellee the relief he requested, and on June 9, 1958, appellant filed its notice of appeal.

Statement of Points.

The District Court erred as a matter of law when it construed "narcotic drugs" as used in 8 U. S. C. 1251(a)-(11), as amended, in the phrase ". . . who at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . narcotic drugs" as not including "marihuana."

---

[2]No discussion in this brief is made of appellee's other contentions of law below because they did not form the bases of the opinion below [R. 23] and hence, are irrelevant here.

[3]Judge Westover's decision in *Hoy v. Mendoza-Rivera* has been appealed to this Honorable Court (C. A. No. 16107). The Government's opening brief is due November 18, 1958.

Question Presented.

Is "marihuana" included within the "narcotic drugs" provision of Title 8 U. S. C. Sec. 1251(a)(1) which reads ". . . who at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . narcotic drugs . . ."?

Statutes Involved.

Title 8 U. S. C. 1251(a), insofar as pertinent, reads:

> "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who —" 66 Stat. 204; enacted June 27, 1952.

Title 8 U. S. C. 1251(a)(11) was amended by Section 301(b), Public Law 728, 70 Stat. 575, July 18, 1956, to read as follows:

> "(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, *or a conspiracy to violate,* any law or regulation relating to the illicit *possession of or* traffic in narcotic drugs, or who has been convicted of a violation of, *or a conspiracy to violate,* any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addition-sustaining opiate;" [The italicized words are the words added by amendment in Public Law 728; otherwise the section reads as when it was enacted as part of 8 U. S. C. 1251(a) on June 27, 1952.]

ARGUMENT.

I.

Public Law 728 Clearly Shows That Congress Regarded "Marihuana" and "Narcotic Drugs" Violators to Be in Pari Delicto and Intended That the Statutes' Sanctions Be Applied Indiscriminately to Both Classes of Offenders.

Initially, it must be conceded, that nowhere in Public Law 728 does Congress expressly define "narcotic drugs" or "marihuana" and, indeed, even therein refers conjunctively to "narcotic drugs and marihuana." Thus, to cite a single example, Public Law 728 itself is described as an Act ". . . to provide for a more effective control of narcotic drugs and marihuana and for other related purposes." (70 Stat. 567.) Further, in substantive criminal statutes, Congress has definitionally differentiated between "narcotic drugs" (26 U. S. C. 4731) and "marihuana" (26 U. S. C. 4761). Yet, this is not a universal distinction. Thus, for civil purposes, in 42 U. S. C. 201(j) and 49 U. S. C. 787(d), Congress included "marihuana" (or "Indian hemp") in its definitions of "narcotics" or "narcotic drugs." However, in Title 8 U. S. C. (viz. Secs. 1182(a)(23) and 1251(a)(11)) Congress uses "narcotic drugs" and "marihuana" without expressly defining the terms.[4]

What was the purpose of Public Law 728, or "The Narcotic Control Act of 1956"?[5] Quite clearly it was prompted

---

[4]It will be argued *infra* that the omission of the "narcotic drug" definition is both significant and deliberate. Congress, then, depending upon the intended purpose of particular legislation, may define "narcotic drugs" independently of "marihuana," as including "marihuana," or not at all.

[5]70 Stat. 567.

by a social problem Congress thought to be critical—the "narcotics problem."[6] If for Federal criminal statutes Congress has recognized a theoretical dissimilarity between "marihuana" and "narcotic drugs," Congress has surely shown that in terms of their practical social consequences it regards "marihuana" and "narcotic drugs" as Siamese twins. For it is together and not singly that these substances and their traffic constitute the "narcotics problem." Compare *Caudillo v. United States,* 253 F. 2d 513 (9 Cir., 1958). It is apparent from Public Law 728, 70 Stat. 567 *et seq.,* that Congress intended to deal equally with the marihuana and the narcotic drug offender.

That Congress regarded the marihuana and narcotic drug trafficker to be equally dangerous, and further intended that the same consequences befall them both, is nowhere better illustrated than in the penalty provisions of Federal Criminal Statutes relating to marihuana (*e.g.,* 21 U. S. C. 176(a)) or narcotic drugs (*e.g.,* 21 U. S. C. 174). With certain exceptions, sentences imposed for either violation are mandatory, 26 U. S. C. 7237; Sec. 103 Pub. Law 728, 70 Stat. 568. These penalty provisions, regardless of the substance dealt in, are equally severe.

It is certainly reasonable to conclude therefore, in face of this graphic display of legislative intent, that Congress desired to deport aliens convicted of "narcotics" violations, without any regard whatsoever to the identity of the substances involved, as another effective way of dealing with the "narcotics problem." To say that in 8 U. S. C.

---

[6]". . . [The] illicit traffic in narcotic drugs and marihuana and their illegal uses" constitutes ". . . one of the most serious social problems confronting the American public today." H. R. 2388; 2 U. S. Cong. & Admin. News, 1956, at p. 3280.

1251(a)(11) Congress did not intend "marihuana" to be included within the meaning of ". . . illicit possession of . . . narcotic drugs" is to flout the congressional intent of the Narcotics Control Act of 1956. Such a construction by the barest of technicalities bestows an unintended and undesirable bonanza. Such a construction compels the absurd conclusion that Congress intended to smile upon the alien convicted of illegally possessing marihuana, and simultaneously to frown on the alien convicted of illegally possessing say, heroin. Clearly such an anomaly should be avoided. Congress, in Public Law 728, obviously desired to achieve broad social ends and the amending sections of Public Law 728 should therefore be broadly construed. Since Title 8 does not expressly define "narcotic drugs" it is submitted that Congress, to achieve its purpose, intended that "narcotic" be given its lay meaning: "A drug which in moderate doses allays sensibility, relieves pain, and produces profound sleep, but which in poisonous doses produces stupor, coma, or convulsions. Among the chief narcotics are "opium (with morphine), belladonna (with atropine), Indian hemp (*i.e.,* marihuana), strumonium and hyoscyasmis," *Webster's New International Dictionary,* 2d Ed. 1956.

II.

Congress Intended That the 8 U. S. C. 1251(a)(11) Phrase, "Possession of Narcotic Drugs," Incorporate State Criminal Statutes' Definition of "Narcotic Drugs."

Prior to his deportation hearing, appellee had been convicted of violating Section 11500 of the Health and Safety Code of California which provides, among other things, that ". . . no person shall possess . . . a narcotic [with inapplicable exceptions]." Section 11001 of that

same Code states that "narcotics . . . means any of the following . . . (h) all parts of the plant *Cannabis sativa L.* (commonly known as marihuana). . . ." While California is apparently not among the forty-four states and three territories that have enacted the Uniform Drug Act (see 9B Uniform Laws Annotated 729), it nevertheless has enacted the definition section of the Uniform Drug Act, 9B U. L. A. Sec. 1, at page 281. However, the point of this apparent digression is that if "narcotic drugs" in the Section 1251(a)(11) phrase "illicit possession of . . . narcotic drugs" depends on state statutes for its interpretations, the order of deportation is valid and the judgment below should be reversed.

The pertinent portion of Title 8, U. S. C. 1251(a)(11) relates to the deportation of an alien convicted of ". . . any law . . . relating to the illicit possession of . . . narcotic drugs." By the use of the word "any" Congress obviously meant state "law[s]" relating to the illicit possession of "narcotic drugs." Congress could not have meant federal criminal laws or statutes because there is no federal crime *per se* for the mere possession of either narcotic drugs or marihuana. If Congress, in Title 8, had expressly provided a definition of "narcotic drugs" that definition naturally would have controlled in applying state laws (*Nicholson v. United States,* 141 F. 2d 552 (9 Cir., 1944)). But, in absence of such an express federal definition, "narcotic drugs" must, if the words "possession of" are to be given meaning, refer to the applicable state laws. The reason Congress did not expressly define "narcotic drugs" in 8 U. S. C. 1251(a)(11), it is submitted, is that full effect could thereby be given to the various state statutory definitions thereof. (*United States v. Eramdjian,* 155 Fed. Supp. 914, 931 (S. D. Cal. 1957).)

Conclusion.

In conclusion, appellant respectfully submits to this Honorable Court:

1. That the whole import and purpose of Public Law 728, 70 Stat. 567, was to deal harshly and indiscriminately with both narcotic drugs and marihuana offenders, including the deportation of aliens so convicted either in state or federal courts; and
2. That in any event, the Narcotic Control Act's amendment of 8 U. S. C. 1251(a)(11) to read "illicit possession of . . . narcotic drugs" was designed to incorporate state statutory definitions of "narcotic drugs," including such definitions that incorporated "marihuana"; and

Hence, for either or both of these reasons the judgment appealed from below should be reversed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

HENRY P. JOHNSON,
Assistant U. S. Attorney,
Attorneys for Appellant.